APPENDIX

APPENDIX "A"

Opinion of the Appellate Court of Illinois

PER CURIAM * (First District, First Division):

Clifford Binder, defendant, was found guilty after a jury trial of the offense of attempt burglary (Ill.Rev.Stat. 1971, ch. 38, par. 8-4) and sentenced to a term of three to nine years. He contends: (1) that the evidence was insufficient to support his conviction beyond a reasonable doubt; (2) that the trial court erred in instructing the jury; and (3) that the State's closing argument was improper, inflammatory and prejudicial.

Norman Brozynski, a Chicago Police Investigator, testified that on August 20, 1972, he was working with his partner, David Gould. They were on a stake-out positioned at the rear of 2720 W. Birchwood, Chicago, Illinois. At approximately 2:00 a.m., they observed the defendant walking westbound down the alley of Birchwood. The defendant entered the yard at 2716 W. Birchwood and walked over to the side door of the garage. Brozynski left his vehicle and positioned himself behind some bushes approximately 20 feet away from the defendant, who turned the knob of the garage door and attempted to open it. When the door did not open, the defendant again turned the door knob and hit the door with his left shoulder. When this also failed to open the door, the defendant walked around to the overhead door and attempted to lift it up. When that door would not open, he turned and walked southbound through the driveway out of the yard at 2716 Birchwood and entered the yard at 2721 Birchwood, where he was placed under arrest. He lived in Glen-

* Mr. Justice Goldberg did not participate.

view, Illinois. He was advised of his constitutional *Miranda* warnings and when asked what he was doing in the yard at 2716 Birchwood he replied that he was just walking through. When asked if he attempted to enter the garage, he answered, "Yes, but I didn't get in."

It was stipulated that if Mark Steinman were called to testify, he would testify that on August 20, 1972, he owned the home and garage at 2716 Birchwood, Chicago, Illinois. He did not at any time give the defendant permission to enter the garage at that address.

The defendant's first contention is that the evidence was insufficient to support his conviction beyond a reasonable doubt because his actions did not constitute a substantial step towards the commission of a burglary and that the evidence was insufficient to establish intent to commit a burglary. While intent is a necessary element of the offense, it may and often must be proven circumstantially by inferences drawn from the facts of the individual case. (*People* v. *Reynolds,* 131 Ill.App.2d 348, 268 N.E.2d 545.) Here, the evidence demonstrated that at 2:00 a.m. the defendant walked through an alley and into the yard at 2716 W. Birchwood. He walked to the side door of the garage, tried the doorknob and, finding the door locked, hit the door with his shoulder in an attempt to open it. When the attempt failed, he walked around to the front of the garage and attempted to lift the overhead door. His actions were sufficient to constitute a substantail step toward the commission of the offense. After being arrested, defendant admitted that he tried to gain entry into the garage. Based upon all of the evidence, the jury was justified in finding, from defendant's actions, that he intended to commit a burglary.

The defendant's second contention is that the trial court erred in instructing the jury on the elements of the offense. He argues that the giving of People's Instruction No. 9, which was IPI Criminal 6.07, was improper, relying upon *People* v. *Woodard,* 7 Ill.App.3d 607, 288 N.E.2d 72. In *Woodard,* the appellate court held that the indictment must allege the specific intent to commit a felony within the premises. That case, however, has subsequently been overruled by the .....

The defendant's final contention is that the closing argument of the State was improper, inflammatory and prejudicial. The defendant's privately retained counsel filed an eight-page, detailed written motion for a new trial, in which he did not argue that the closing argument of the State was prejudicial or improper. It is a well-established rule that where a written motion for a new trial was presented, all errors not presented in that motion are deemed waived on appeal. (*People* v. *Irwin,* 32 Ill.2d 441, 207 N.E.2d 76; *People* v. *Dixon,* 10 Ill.App.3d 1038, 295 N.E.2d 556.) The failure to include in his written motion the contention that the State's closing argument was prejudicial constitutes a waiver thereof, and the defendant is now prohibited from raising that issue on review.

Even if we were to consider defendant's argument on its merits, the remarks by the prosecutor in his closing argument do not constitute reversible error. The defendant argues that the prosecutor's closing argument was designed to arouse fear and passion in the minds of the jury, that the prosecutor improperly commented on the defendant's failure to testify and that the prosecutor incorrectly stated the law applicable to the case. It is a well-established rule that improper remarks by a prose-

cutor do not constitute reversible error unless they result in a substantial prejudice to the defendant. (*People* v. *DeSavieu*, 11 Ill.App.3d 529, 297 N.E.2d 336; *People* v. *Nilsson*, 44 Ill.2d 244, 255 N.E.2d 432.) The determining factor as to whether a prosecutor's closing argument constitutes reversible error is whether there was a reasonable possibility that the argument contributed to defendant's conviction. (*People* v. *Bracy*, 14 Ill.App.3d 495, 302 N.E. 2d 747.) In this case, the prosecutor's closing argument was not improper.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

APPENDIX "B"

STATE OF ILLINOIS

Office of

CLERK OF THE SUPREME COURT
Springfield
62706

Justin Taft
Clerk

September 27, 1974

Telephone
Area Code 217
782-2035

O'Donnell, Wolff, LeVine,
Mazzorana & Krupa
100 North La Salle Street
Chicago, Illinois 60602

No. 46743--People State of Illinois, respondent, vs. Clifford Binder, petitioner. Leave to appeal, Appellate Court, First District

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Justin Taft
Clerk of the Supreme Court